

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRED KOSTERING,
Appellant and Defendant,
vs.
SEATTLE BREWING & MALTING
COMPANY (a corporation),
Appellee and Complainant.

Appellant's Opening Brief.

F. J. CASTLEBUN,
Solicitor for Appellant.

FILED

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

FRED KOSTERING,
Appellant and Defendant,

vs.

SEATTLE BREWING & MALTING
COMPANY, a Corporation,
Appellee and Complainant.

No. 834

APPELLANT'S OPENING BRIEF.

Statement of the Case.

The complainant, incorporated in the State of Washington, and engaged in the brewery business at Seattle, adopted the appellation of "Rainier Beer" for its product. Upon the bottles in which its beer is sold the complainant uses as a trademark a label, one of which is to be found on page 2 of the transcript.

The defendant is the sole bottler and vendor at San Francisco of the beer brewed by and at the brewery of the Los Angeles Brewing Company, a corporation of the State of California, with its principal place of business at Los Angeles. To distinguish this product, to which he has given the name of "Rhinegold Beer", from all other beers, the defendant adopted as his trade-

mark the label to be found on page 5 of the transcript.

Complainant's bill charges this label to be a colorable imitation of its own, and that its use by defendant was calculated to deceive and mislead the public into the belief that the beer sold by the defendant under his label is "Rainier Beer" and that such use by appellant of his label constitutes unfair and fraudulent competition against the complainant.

The bill then prays for a writ enjoining the defendant from selling any beer, other than complainant's UNDER OR BEARING THE LABEL OR DESIGNATED BY THE WORDS 'RHINEGOLD BEER'."

Upon the filing of the bill the Court issued an order requiring the defendant to show cause why the writ prayed for should not be granted.

In response to this order and in opposition to the application, the defendant appeared and filed the affidavit set out on pages 16 to 22 of the transcript, in which all dishonest intention was entirely repudiated.

Upon the hearing of the motion for the injunction, the Court granted an order restraining defendant *pendente lite* from selling any beer, other than complainant's, under the complainant's or defendant's label.

From this order the defendant appealed, specifying that the Court erred among other things in holding:

1. That defendant's label was an imitation of complainant's.
2. That the use of defendant's label constituted unfair competition.
3. That defendant had so imitated complainant's

label as to mislead and deceive the public and induce purchases of defendant's beer under the belief that it was complainant's.

4. That defendant's label bore such similarity to that of complainant's that it was likely to impose on and deceive the public or ordinary purchasers.

Other errors are specified, but as they are variations of the four above set forth, there is no need of calling special attention to them:

Argument.

Motto:

"I am not, as I consider, to decide cases in favor of fools and idiots, but in favor of ordinary English people, who understand English when they see it."

Sir George Jessel in
Singer Mfg. Co. vs. Wilson, L. R., 2nd. Ch., D.
434.

In trademark cases involving label infringements comparison is ordinarily the very first test employed to determine whether there is such a resemblance as will justify interference on the part of a court of equity.

If we apply this test to the case at bar, it will be seen that the charge made by the bill, that the main features of defendant's label are *colorably identical* with those of complainant's, is wholly unfounded.

The names of the two brewery companies, as written and spoken, have not the faintest resemblance to each other. On defendant's label the name of the *Los Angeles* corporation is printed in large type and as plainly as that of the *Seattle* corporation upon com-

plainant's. The names of the two products are likewise dissimilar to both eye and ear. The pictorial features on the one label cannot be mistaken for those on the other. On complainant's label we find a picture of majestic *Mount Rainier*; on defendant's, what a poetic imagination will recognize as the *Rhine-Falls of Schaffhausen*, upon whose waters "are reflected the golden rays of a vermilion-red sun disappearing behind the hills". The symbols or emblems upon both labels are also quite different. Upon complainant's, the device is a *white circle with red stars in the border*, the word "*Brewing*" extending across the same. Upon defendant's is a *shield with gilt border, the field representing a bear upon a rocky shore of the Golden Gate and the setting sun in the distance*. At the bottom of defendant's label is printed "*Fred Kosterling, sole dealer for San Francisco, California*", while at the bottom of complainant's label we have "*John Rapp & Son, sole agents for California*".

No unprejudiced person can so far detect the least similarity in the two labels, and if asked to point out any with both before him, he could only say that in both there is a red border and also a red banner or streamer upon which there is printed "*Rainier Beer*" in the one case, and "*Rhinegold Beer*" in the other, the lettering, however, being wholly dissimilar, except that the capital "R's and "B's are the same in the names of both products.

The question to be decided is: DOES SLIGHT RESEMBLANCE IN UNESSENTIAL PARTICULARS OUTWEIGH GREAT DISSIMILARITY IN ESSENTIAL FEATURES?

An examination of the decisions and authorities will compel the Court to answer this question in the negative.

The cardinal rule upon the subject of unfair competition in trade is, that no one shall by imitation or any unfair device, induce the public to believe, that the goods he offers for sale are the goods of another and thereby appropriate to himself the value of the reputation which the other has acquired.

- Coats vs. Thread Co.*, 149 U. S. 562;
Sterling Remedy Co. vs. Eureka Chemical and Mfg. Co., 70 Fed. 704, affirmed in *25 C. C. Ap.*, 314;
Proctor &c. Gamble Co. vs. Globe Refining Co., 921 Fed. 357;
P. Lorillard Co. vs. Peper, 30 C. C. A. 496;
Pittsburg Crushed Steel Co. vs. Diamond Steel Co. et al., 85 Fed. 637;
Kahn et al. vs. Diamond Steel Co., 89 *idem* 706;
Liggett & Meyer Tobacco Co. vs. Finzer, 128 U. S. 182;
Enoch Morgans' Sons' Co. vs. Troxell, 89 N. Y. 292;
Foster vs. Webster Piano Co., 13 N. Y. Supp. 338 (Supreme Court);
Desmond's Ap., 103 Pa. St. 126;
Gessler vs. Grieb, 80 Wis. 21;
Brown Chemical Co. vs. Myer, 31 Fed. 1453;
Hall vs. Barrows, 4 De G. J. S. 150;
Munn vs. Kirk, 40 Fed. 589;
McCartney vs. Garnhart, 45 Miss. 593;
Merchants' Banking Co. vs. Merchants' Joint Stock Bank, 9 Ch. D. 560;
Mfg. Co. vs. Trainer, 101 U. S. 51;
Blackwell vs. Crabb, 36 L. J. Ch. 504;

Blackwell vs. Wright, 73 N. C. 310;

Leather Cloth Co. vs. Am. Cloth Co., 11 H. L. 523.

I shall not quote at large from all of these cases, but only promiscuously from a few of them.

In *Kann, et al. vs. Diamond Steel Co.*, *supra*, the Court said: "When all the words and symbols used by these litigants upon their respective packages, as they are actually offered for sale to the trade are considered, all possibility of their confusion or of the mistake of the one for the other, seems to disappear. *The name of the product, the name of its manufacturer and the place of its manufacture* are certainly three of the most distinctive characteristics by which an article of commerce may be distinguished from another."

In the case at bar the names of the manufacturers and of the product and of the place of manufacture are entirely different on both labels.

In *P. Lorillard Co. vs. Peper*, *supra*, Mr. Justice Brewer said: "Now whatever *minor points of resemblance* may be pointed out between these two labels, it seems to us the *differences are so pronounced* that there is no reasonable ground to apprehend that any man of ordinary intelligence would be misled. The two principal ways by which an article is distinguished in trade are: 1st, *the name of the manufacturer*; 2nd, *the descriptive name*. It is said, that the plaintiff had acquired a reputation which attached to all of its manufactures and that Lorillard's tobacco, particularly in the district where competition arose between plaintiff and defendant, was generally known, and known as a

superior article. Concede this, and it appears in the most marked way upon the defendant's label, *that it is not Lorillard's tobacco that he is selling.* The name 'Peper's' is in the largest letters and in the most conspicuous place. No one who was looking for Lorillard's tobacco could for a moment be deceived into believing that this was that tobacco. *There is no similarity between the names. Neither the number of syllables nor the number of letters are the same and there is only one letter in the two names alike.*

"The other principal mode of identification is *the name under which the product passes*, and here the difference between the two names (though perhaps not so pronounced) is still marked and obvious. 'Tuberose' and 'True Smoke' when spoken do not sound alike, do not suggest the same idea; and while, considering the number of letters and the letters themselves, there is more of similarity than between the names of the manufacturers, yet the contrast between the two is apparent at a glance. *So that the two important features—those by which a purchaser identifies that which he wishes to purchase—the differences are so radical and obvious that it is difficult to perceive how any one could be misled.*"

If we paraphrase the latter part of the opinion to fit the facts in the case at bar, it would read as follows: "*The name 'Los Angeles Brewing Company' is in the largest letters and the most conspicuous place. No one who was looking for Seattle Malting and Brewing Company's beer would for a moment be deceived into the belief that this was that beer. There is no similarity between the*

names. Neither the number of syllables nor the number of letters are the same, AND THERE IS NO LETTER IN THE TWO NAMES ALIKE.

“The other principal mode of identification is the name under which the article passes and HERE THE DIFFERENCES BETWEEN THE TWO NAMES ARE STILL MORE MARKED AND OBVIOUS.” (The Court will notice that owing to the pronounced difference between the two names of the products there is a deviation from the exact language of the opinion of Mr. Justice Brewer.) *“‘Rainier’ and ‘Rhinegold’ when spoken do not sound alike, do not suggest the same idea;”* (Here, again, a deviation must take place, because the dissimilarity in the number of letters and the letters themselves is as great as between the names of the manufacturers and the products.) *“Yet the contrast between the two is apparent at a glance. So that in the TWO IMPORTANT FEATURES—THOSE BY WHICH A PURCHASER IDENTIFIES THAT WHICH HE WISHES TO PURCHASE—THE DIFFERENCES ARE SO RADICAL AND OBVIOUS THAT IT IS DIFFICULT TO PERCEIVE HOW ANY ONE COULD BE MISLED.”*

In *Sterling Rem. Co. vs. Eureka Chem. & Mfg Co.*, *supra*, it was claimed that “No-To-Bac” was infringed by “Baco-Curo”.

The Court, in holding that the terms were not *idem sonans* and did not infringe one on the other, said:

“It is sufficient to say that both parties have the right to embark in this trade; each has the right to put forth every legitimate effort to increase its sales, even at the expense of its rivals, SO LONG AS IT

REFRAINS FROM REPRESENTING ITSELF AS THE RIVAL CONCERN, OR FROM REPRESENTING ITS GOODS AS THE GOODS OF THE RIVAL CONCERN."

In *Hall vs. Barrows, supra*, the Court said:

"Imposition on the public is necessary for the plaintiff's title, but it must amount to an invasion by the defendant of the plaintiff's right of property. *For there is no injury if the mark used by the defendant is not such as is mistaken or likely to be mistaken by the plaintiff for the mark of plaintiff.*"

In *Merchant's Banking Co. vs. Merchant's Joint Stock Co., supra*, it is held that when there is no intention upon the part of the defendants to appropriate, and no probability of their appropriating, plaintiff's business *and the similarity in the names used is not such as to necessarily lead to the inference of any intention to deceive, and that when there is no proof of actual deception by the use of the name adopted by the defendants,* ALTHOUGH IT SOMEWHAT RESEMBLES THAT OF PLAINTIFF, *relief will be refused.*

In *Blackwell vs. Crabb, supra*, it is held that the use of a particular label will not be restrained upon the ground of its general resemblance to the trademark of another manufacturer, when the defendant's label differs in those points which a purchaser would be most likely to examine, to ascertain whose article he was purchasing.

It was held in *Leather Cloth Co. vs. American Cloth Co., supra*, that when the differences between the two devices are so palpable that a person of ordinary care

and diligence would not be deceived, equity will not enjoin.

To warrant the relief by injunction the devices adopted to the prejudice of the earlier business must be such as would ordinarily lead persons dealing in the article in question to suppose defendant's article to be that of plaintiff.

It must at least appear, it was held in *McCartney vs. Garnhart, supra*, that the resemblance is such as to raise the probability of a mistake on the part of the public or of a design and purpose on the part of the defendant to deceive the public.

In *Munn vs. Kirk, supra*, it was held that the use of a label on packages or bottles will not be enjoined when there is no attempt at deception thereby.

The principle on which equity interferes in infringement cases is that the use of a label resembling another amounts to false misrepresentation.

"When," says *High (2nd High on Injunctions, 3d. Ed. Par. 1086)* "there is no false representation or deceit, *the defendant only endeavoring by his advertisement and by selling the article complained of, to show to the public that the article is that of his own manufacture, equity will not interfere, EVEN THOUGH THE DEFENDANT MAY ALSO USE AS DESIGNATING HIS ARTICLE THE NAME OF THE ORIGINAL MANUFACTURER OF THE ARTICLE SOLD BY THE PLAINTIFF.*"

20: Ky. Dist & D. Co. vs. Notley et al 110 Fed. 6411
20: Ky. Dist & D. Co. vs. Notley et al 109 Fed. 898
 In the case at bar it is perfectly obvious that the defendant by his advertisement is not practicing any deceit or representing his beer to be the beer of the

complainant. The label clearly informs the public that "Rhinegold Beer" is the manufacture of the Los Angeles Brewing Company and not "Rainier Beer" brewed by the Seattle Malting and Brewing Company.

The disposition is apparent that the appellant is desirous of conducting an open and fair competition.

When that is the case, there is no ground for complaint, *even though there be some similarity in the two trademarks.*

Pittsburg Crushed Steel Co. vs. Diamond Steel Co. et al., supra.

The appellant therefore submits that the order of the Circuit Court must be reversed.

F. J. CASTELHUN,
Solicitor for Appellant.

